IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1501

JAMES JEFFERSON MCLAIN, ET AL., *Petitioners,*

v.

REAL ESTATE BOARD OF NEW ORLEANS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT LATTER & BLUM, INC.

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QUESTIONS PRESENTED

Petitioners McLain *et al.* (hereinafter "plaintiffs"), and the United States as amicus curiae (hereinafter "the government"), contend that this case involves the sweeping question of whether real estate brokerage services, in general, throughout the United States, are subject to the Sherman Act. They ask the Court to presume the existence of a substantial effect on interstate commerce. The government has even gone so far

as to suggest (at 13) that the issue of whether the actual activities of the respondents involved in this case "affected commerce in a particular fashion is irrelevant," and that Sherman Act interstate commerce questions "should not be the subject of a trial." No authority is cited for this proposition and there is none.

Respondent Latter & Blum is a realtor licensed only in Louisiana and doing business only in Louisiana. Like the other realtor-respondents, Latter & Blum is concerned that this case be considered in the context of its particular facts, the same way in which this Court has considered every single Sherman Act interstate commerce case it has ever decided, and that this case not be used as the vehicle for wholesale "federalization" of local business. Accordingly, the questions presented for review here are as follows:

1. Whether the district court's finding, based on uncontradicted evidence, affirmed by the court of appeals, that New Orleans real estate brokerage services do not substantially affect interstate commerce, is clearly erroneous.
2. Whether a substantial effect on interstate commerce can be presumed based on the fact that some real estate purchases are financed and insured by firms involved in interstate commerce, even where New Orleans real estate brokers play no substantial, let alone integral, part in the securing of such financing or insurance.
3. Whether a substantial effect on interstate commerce can be presumed from the fact that price fixing has been held a *per se* antitrust violation, even where the particular practices complained of in this case do not substantially affect interstate commerce.

STATEMENT OF THE CASE

On October 31, 1975, plaintiffs, on their own behalf, and purportedly on behalf of all buyers and sellers of residential real estate in the New Orleans area, charged defendant real estate brokers with fixing the price of real estate brokerage services for the sale of residential real estate in the Jefferson and Orleans Parishes of Louisiana. (McLain Pet. App. 1a-16a) Defendants moved to dismiss the complaint on the grounds of lack of subject matter jurisdiction. (A 18) After extensive briefing, the district court ordered discovery on the jurisdictional issues. (A. 80) Plaintiffs deposed and discovered documents from nine witnesses including government officials, real estate brokers, mortgage lenders and real estate title insurers. (A. 80-96, 108-116) After reviewing the record evidence adduced by plaintiffs, the district court reached the "inescapable conclusion" that the activities of the defendant brokers had only an incidental rather than substantial relationship to interstate commerce and, therefore, granted the motion to dismiss. (McLain Pet. App. 17a-23a) A unanimous Fifth Circuit panel affirmed, agreeing that the brokers had only an incidental effect on interstate commerce. The evidence supporting that conclusion, the court observed, was "essentially uncontradicted." (McLain Pet. App. 24a-43a) This Court granted plaintiffs' petition for certiorari on May 4, 1979.

SUMMARY OF ARGUMENT

I

Plaintiffs and the government contend that this case involves the issue of whether real estate markets, in general, across the nation, substantially affect inter-

state commerce. They contend that if any aspect of the real estate industry anywhere in the nation affects interstate commerce, then every aspect does. This is a radical departure from traditional doctrine and fundamentally misconstrues this Court's prior Sherman Act interstate commerce opinions that have solely focused upon the particular facts of each case. The Court has repeatedly rejected adopting the kind of general sweeping rules plaintiffs and the government advocate here.

II

After reviewing the extensive record created by plaintiffs, the district court came to the "inescapable conclusion" that defendants' brokerage services do not substantially affect interstate commerce. The court of appeals found the evidence supporting this conclusion "essentially uncontradicted." This evidence shows simply that the brokerage function is essentially completed when buyer meets seller. After that point, the broker plays no more than an informational, incidental role, at most, in the process by which the buyer secures any financing or title insurance. The district court's factual findings cannot be overturned unless "clearly erroneous," and there is no error here. Moreover, the conclusion that no substantial interstate commerce is affected is fully consistent with this Court's prior decisions.

III

Faced with an adverse factual record of their own creation, plaintiffs effectively wish the record away and ask that a substantial effect on interstate commerce be presumed. Based on the facts of this case, such a

presumption would not only be wholly inappropriate, but also fundamentally inconsistent with the prior, intensely fact-oriented, decisions of this Court. Making the argument for the first time, plaintiffs ask this Court to hold that brokerage fees, which are paid by the homeseller, are presumptively passed-on to the homebuyer in the form of higher home prices, which in turn affect the interstate flow of money. This passing-on hypothesis was not presented to the lower courts, is totally unsupported in the record, and squarely conflicts with this Court's recent decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), which held the passing-on theory so economically speculative it had no place in antitrust jurisprudence.

IV

Plaintiffs ask this Court conclusively to presume a substantial effect on interstate commerce merely because they have alleged a *per se* antitrust violation. This theory has never been adopted by a single court. Moreover, by sweeping into the federal domain literally thousands of practices previously of exclusive state concern, plaintiffs' theory would significantly change the federal-state balance with no discernible justification.

ARGUMENT

I. The Court's Inquiry Should Focus Upon The Particular Facts Of This Case And Not, As Plaintiffs And The Government Contend, Upon Real Estate Markets In General

The defendants have been charged with fixing the commission rate for brokerage services in connection with the sale of residential real estate located in the

Orleans and Jefferson Parishes of Louisiana. Rather than attempting to show that defendants' specific activities in these two Louisiana parishes have substantially affected interstate commerce, plaintiffs and the government have devoted the bulk of their briefs to discussing real estate markets in general and to statistics showing the amount of money involved in real estate financing nationally. Plaintiffs (at 36) have asked the Court to formulate "a general theory of interstate involvement in local real estate markets." The government (at 13) has gone even further and suggested that whether or not the specific activities of the defendants in this case have affected interstate commerce is "irrelevant." It even argues (*id.*) that Sherman Act interstate commerce questions "ordinarily should not be the subject of a trial."

Latter & Blum is a local concern which has great difficulty in assimilating what the plaintiffs' "general theory" is, unless it means that every local realtor, everywhere in the United States, should be federalized. Still, coming from a handful of local plaintiffs who are within an eyelash of being out of court, such an extreme position is as understandable as it is wrong. The government's move to federalize realtors, however, can only be premised upon an unprecedented view that the Sherman Act does not concern itself with the nature of the alleged restraint, nor with the identity of the alleged restrainer, but rather with some generalized nonspecific notion of the business or profession in which the defendant happens to earn his living.

These contentions, however, fundamentally misconceive the proper nature of the inquiry here.

In its prior Sherman Act interstate commerce decisions, this Court has repeatedly rejected the adoption of sweeping general rules, and has instead focused specifically upon whether the particular acts alleged in each case substantially affected interstate commerce.

In *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), for example, where the plaintiff unsuccessfully sought to show an interstate commerce nexus with a conspiracy among producers of asphalt used in interstate highway construction, this Court held:

> The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions. [419 U.S. at 202]

In finding plaintiff's proof insufficient, the Court indicated its decision was based solely on the facts of the case before it:

> The District Court concluded on the basis of the record before it, that petitioners alleged antitrust violations had no 'substantial effect on interstate commerce.' There may be circumstances in which activities, like those of defendants Sully-Miller and Industrial would have such effects on commerce. On the record in this case, however, the conclusion of the District Court that no such circumstances existed here cannot be considered erroneous. [419 U.S. at 202-03]

Similarly, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), in holding that legal fees for title examinations in Fairfax County, Virginia, substantially affected interstate commerce, the Court explicitly

confined its decision to the specific facts before it rather than discussing legal services in general:

> [T]here may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act. [421 U.S. at 785-86]

Moreover, contrary to the assertions of plaintiffs, the Court in *Goldfarb* did not hold that transactions in land generally affect interstate commerce. Instead, the Court simply held that where legal services were essential to the making of an interstate loan, those services affect interstate commerce. For purposes of the Court's analysis, however, it was irrelevant that the loan proceeds were used to purchase realty.

In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the Supreme Court likewise rejected the government's urging of a general rule concerning all taxicabs, and instead, carefully scrutinized the particular facts of the case and held that some taxi services were interstate while others were not.[1]

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[1] The lower court decisions concerning the relationship between brokerage services and interstate commerce have similarly focused upon the specific facts of each particular case. In *U.S.* v. *Foley*, —— F.2d ——, 1979-1 Trade Cases ¶ 62,577 (4th Cir. 1979), pets. for cert. pending, No. 78-1737 and 78-1838, for example, the court noted:

> [T]he results in particular cases . . . have turned, quite appropriately, on their peculiar facts rather than on legal standards generally applicable to particular categories of business, professional or trade activities. (¶ 62,577 at 77,321)

As the court of appeals said in the case at bar, the different conclusions reached by the lower courts "result in part from the varying factual gradations alleged." *McLain* v. *Real Estate Board of New Orleans, Inc.*, 583 F.2d 1315, 1320 (5th Cir. 1978). The

Ignoring this Court's consistent focus on the specific restraint alleged in each case, however, the government contends throughout its brief that if *any* aspect of the real estate business, *anywhere* in the nation, affects interstate commerce, then *every* aspect of the real estate business must be considered to affect commerce. In support of this radical departure from traditional Sherman Act doctrine, the government relies upon some totally inapposite cases upholding the constitutionality of federal statutes regulating certain intrastate activities that, viewed in the aggregate, exacerbated some interstate, national problem.[2]

Challenges to the constitutionality of a statute, however, are decided in a completely different context from questions of interstate commerce involvement in Sherman Act cases. Federal statutes are presumed constitutional "until the contrary is shown beyond a rational doubt." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90-91 (1958). Here, to the contrary, where the District Court could find no substantial effect on interstate commerce on the basis of uncontradicted evidence gathered and proffered at plaintiffs' behest, its findings must be accepted unless "clearly erroneous." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 338-39 (1952). Moreover, in *Gulf Oil Corp., supra,* this Court held that its

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court also held, correctly defendants contend, that the "polestar for analysis" (*id.*) is the specific factual context of each particular case.

[2] *See, e.g., Wickard* v. *Filburn*, 317 U.S. 111 (1942) (upholding statute regulating wheat production even as applied to wheat consumed on farm where grown); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (upholding anti-discrimination law even as applied to small family-owned restaurant).

Commerce Clause review of federal statutes specifically regulating a particular line of business was significantly different from its review of interstate commerce questions arising under general statutes like the Sherman Act:

> The jurisdictional inquiry under general prohibitions like . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore, require federal regulation. Compare *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 232-33 (1947), with *e.g., Perez* v. *United States*, 402 U.S. 146 (1971); *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). [419 U.S. at 197 n. 12]

Accord: United States v. *Darby*, 312 U.S. 100, 120-21 (1941). Thus, in holding that Sherman Act interstate commerce questions turn on the "circumstances presented in each case," this Court has rejected the identical argument pressed by the government here.

Congress has passed no statute regulating real estate brokerage fees. Plaintiffs cite the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et. seq.* (1976), which requires uniform disclosure of settlement charges, including broker's fees. However, the final Senate Report on the Act specifically stated that a proposed amendment to regulate the *level* of settlement charges was rejected as beyond Congress's power and an infringement upon the power of states:

> Federal authority to establish rates for settlement charges would infringe on an area that has historically been of State and local concern. . . .

S. Rep. No. 93-866, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6546, 6550. Thus, far from indicating a Congressional assertion of sweeping federal power over real estate transactions in general, or the specific activity alleged in this case—fixing the level of brokerage fees—the only relevant expression of legislative opinion reflects Congress's view that its authority in this area is quite limited.[3] Indeed, this legislative history points 180 degrees away from the "Congressional intent" plaintiffs seek to infer.

Under the prior decisions of this Court, therefore, the only issue involved here is whether plaintiffs proved that the specific alleged unlawful practices of the particular defendants in this case, real estate brokers in the Orleans and Jefferson Parishes of Louisiana, substantially affected interstate commerce.

II. Based On The Facts Of This Case The District Court Properly Found No Substantial Effect On Interstate Commerce

The requisite interstate commerce nexus may only be found where plaintiffs prove that the activities challenged as unlawful under the Sherman Act are either

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[3] Based upon a similar Congressional doubt, revealed in the legislative history, about federal power over intrastate affairs, this Court in *United States* v. *Bass*, 404 U.S. 336 (1971), held that the Omnibus Crime Control and Safe Streets Act of 1968 only prohibited firearm possession by convicted felons where an interstate commerce nexus could be shown: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." [404 U.S. at 349] *See also, Scarborough* v. *United States*, 431 U.S. 563, 575 (1977), where the Court commented on *Bass*: "There was some [Congressional] concern about the constitutionality of such a statute. It was that observed ambivalence that made us unwilling in *Bass* to find the clear intent necessary to conclude that Congress meant to dispense with the nexus requirement entirely."

"in interstate commerce" or "substantially affect interstate commerce." Plaintiffs have abandoned (at 13) the theory argued below that defendants activities are in commerce, and now exclusively place their hopes on the affecting commerce theory. The particular streams of interstate commerce which plaintiffs theorize (at 48-49) are substantially affected by defendants are "the financing, title insurance and loan guarantee aspects of real estate transactions in New Orleans and throughout the United States."[4] After extensive discovery,[5] however, plaintiffs were utterly unable to substantiate this theory. As held by the district court:

> [T]he inescapable conclusion to be drawn from the evidence is that the participation of the broker in these (presumably interstate) phases of the real estate transaction is an incidental rather than indispensable occurrence in the chain of events.

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[4] In identifying these streams of interstate commerce, plaintiffs have properly conceded (at 26 n. 53, and 35) that the mere movement of people across state lines is "not sufficient" to establish a substantial effect on interstate commerce. Accordingly, plaintiffs have staked their case on other factors.

[5] Plaintiffs noticed and took nine depositions, and subpoenaed documents from the deponents. While plaintiffs now appear to complain that discovery was incomplete because certain interrogatories were not answered, they have no one to blame but themselves. The district court authorized discovery on jurisdictional issues on September 3, 1976, but plaintiffs' interrogatories were not served until more than three months later, on December 22, 1976, only nine days prior to the close of discovery. Moreover, while the interrogatories to defendants were not answered, plaintiffs' depositions covered most of the same territory. Plaintiffs, quite understandably, fail to suggest what better results they hoped to obtain with their eleventh hour interrogatories than they obtained with their nine hand-picked depositions.

McLain v. *Real Estate Board of New Orleans,* 432 F. Supp. 982, 985 (E.D. La. 1977). This finding by the District Court cannot be overturned unless "clearly erroneous." *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 338-39 (1952). Not only is there no such clear error here, the evidence in the record supporting this finding is, as held by the court of appeals, "essentially uncontradicted." [583 F. 2d at 1372]

The extensive record reveals the following critical and uncontroverted facts: All the defendant real estate brokers are located in Louisiana, and are charged solely with fixing brokerage service prices for the sale of Louisiana real estate. (Complaint, McLain Pet. App. 1a-16a). Defendants' brokers licenses, issued by the state of Louisiana, permit sales only in Louisiana. (A. 271) The brokerage function is limited to bringing buyer and seller together and is essentially completed at that time. (432 F. Supp. at 985, A. 41, 43-44) There is no legal or practical necessity for utilizing a broker's services to sell residential real estate. (A. 41, 43) Brokers "play no part at all" in the lender's decision whether to approve a loan for a prospective purchaser. (A. 145-46) Brokers play no part at all in an insurer's decision whether to issue a title insurance policy. (A. 151) Brokers play no part at all in the federal government's decision whether to guarantee a loan. (432 F. Supp. at 985 n. 4) Brokers occasionally refer prospective purchasers to particular lending institutions, but their role is strictly informational. In at least 60-70 percent of the cases, the buyers contact the lender on their own or through referrals from friends and relatives. (A. 145-46, 198) The broker plays no part in the completion of the real estate transaction at closing. (A. 287)

Based on these facts, the District Court could only have found a lack of substantial effect on interstate commerce. This conclusion, moreover, is fully consistent with the prior decisions of this Court.

In *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950), a suit charging District of Columbia realtors with price fixing, the Court's opinion stated: "The fact that no interstate commerce is involved is not a barrier to the suit." [*Id.* at 488] While this statement is dictum because the District of Columbia's special status eliminated any interstate commerce requirement under the Sherman Act, the activity commented upon—real estate brokerage services within a single jurisdiction—is precisely what is involved in the case at bar.

In *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), the rationale that led the Court to find that lawyers' title examination services substantially affected interstate commerce, points to just the opposite conclusion here. The opinion stressed that the intrastate legal services were "essential," "integral," "inseparable" elements of interstate loan transactions because without them, the lender could not grant a loan. [*Id.* at 784-85] Here, to the contrary, the uncontradicted record evidence shows that brokers play no role whatever in a lender's decision to grant a loan. As one lender responded to a deposition question put by plaintiffs' attorney:

> [W]e do not underwrite our loans on what the real estate agent does. It is of no importance to us what the real estate agent thinks. (A. 135)

He further stated that the broker was basically a nuisance when a purchaser comes in to discuss a loan:

> You prefer them (brokers) not to sit there, because, frankly, making a loan is none of their business, the real estate agent. I don't mean that to be derogatory. It is not the agent's job. We do the underwriting and make the loans and approve the loans, not the agents. (A. 137-38)

This Court's decision in *United States* v. *Yellow Cab Co.,* 332 U.S. 218 (1947), also supports the District Court's conclusion that an incidental effect on interstate commerce is insufficient to meet the Sherman Act's interstate commerce requirement. The Court held that taxicab service for interstate travelers between train stations in Chicago was "part of the stream of interstate commerce," but that a conspiracy affecting otherwise local taxicab service did not involve interstate commerce. The parallels between the local cab service in *Yellow Cab* and the brokerage services involved here are striking. The Court commented that the cabs crossed no state lines and were limited by ordinance to trips within the city of Chicago. The Court said that even where the cab happened to transport a passenger from his home to a train station for an interstate trip, no interstate commerce was involved since "to the taxicab driver, it is just another fare." [332 U.S. at 232] Moreover, the Court commented that taxi service was just one of many ways a traveler could get to the station.

Similarly, here, the defendant real estate brokers are limited by their licenses to selling only Louisiana real estate. Additionally, once the broker completes his function of bringing together buyer and seller it is irrele-

vant to him whether the buyer pays cash for the house, assumes an existing mortgage, or secures a loan from a firm that in turn operates in interstate commerce. To a broker, each sale is "just another commission." Moreover, as one lender aptly put it, when a broker refers a prospective purchaser, the broker is simply "a good taxicab to bring him down." (A. 137) And, as the lender also said, 60-70 percent of the time the broker has nothing to do with the referral—the purchaser comes on his own. (A. 146)

Thus, *National Association of Real Estate Boards, Goldfarb,* and *Yellow Cab Co., supra,* all support the conclusion that defendants' real estate brokerage services do not substantially affect interstate commerce. The various cases relied upon by plaintiffs, where this Court found the interstate commerce requirement satisfied, all involved defendants who themselves were engaged in interstate commerce, or alleged conspiracies whose targets were firms engaged in interstate commerce. Neither factor is present here.

In *Burke* v. *Ford,* 389 U.S. 322 (1967), and *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (1948), for example, the defendants themselves were engaged in the interstate purchase or sale of liquor and sugar, respectively. The Court had no trouble concluding that the intrastate activities of these firms—procurement of raw material and intrastate distribution of goods shipped interstate—were essential, integral parts of their own interstate activities. Similarly, in *United States* v. *Employing Plasterers Association,* 347 U.S. 186 (1954), *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 U.S. 738 (1976), and *United States* v. *Women's Sportswear Manufacturer's Association,* 336 U.S. 460 (1949), the target of each

alleged conspiracy was a firm engaged in interstate commerce. In *Plasterers,* the defendants allegedly conspired to prevent out of state contractors from selling in Chicago. In *Rex Hospital,* the defendants allegedly conspired to prevent the expansion of a competing hospital that was substantially engaged in interstate commerce. In *Women's Sportswear,* the defendants allegedly threatened to boycott, and thus, put out of business, firms that engaged in interstate commerce.

Unlike these cases, however, the real estate broker defendants here are far removed from, and completely independent of, any interstate commerce. Plaintiffs (at 13) have conceded that the brokers are not in commerce. Moreover, as found by the district court, the uncontradicted evidence establishes that the broker's relationship with the firms plaintiffs allege *are* in interstate commerce—lenders and insurers—is only incidental at most. Thus, because plaintiffs have simply failed to prove any facts indicating that brokerage services substantially affect interstate commerce, the dismissal of their complaint should be affirmed.

III. A Substantial Effect On Interstate Commerce Cannot Be Presumed Merely Because Some New Orleans Real Estate May Be Financed Or Insured By Firms Engaged In Interstate Commerce

A. Brokerage services do not presumptively affect interstate commerce

Faced with essentially uncontradicted evidence that New Orleans brokers' services do not in fact substantially affect interstate commerce, plaintiffs argue (at 27) that the volume of interstate realty lending and insuring is so great this Court should simply presume such an effect as a matter of law. As discussed above, however, this Court has uniformly held that interstate

commerce questions turn on the particular facts in each case, and there is no evidence here that brokers play any more than an incidental informational role in the realty lending and insuring process.

Moreover, in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), the Court rejected an argument virtually identical to the argument plaintiffs make here, and held that proof of interstate commerce must be based on facts, not on presumptions. The defendants in *Gulf Oil* were manufacturers of asphaltic concrete used for intrastate repair and construction of interstate highways. They were charged, among other things, with tying the sale of the asphalt to sales of other commodities and to the receipt of loans on favorable terms, in violation of § 3 of the Clayton Act. Because interstate highways were involved, just as plaintiffs contend interstate lending is involved here, the Ninth Circuit found the interstate commerce requirement satisfied "as a matter of law." [419 U.S. at 192] This Court squarely reversed, holding that defendants' activities were not "in commerce," and that even if "affecting commerce" were the relevant jurisdictional standard under the Clayton Act, such effects could not be presumed:

> The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions . . .
>
> Copp . . . argued merely that such effects could be presumed from the use of asphaltic concrete in interstate highways. The District Court concluded, on the basis of the record before it, that petitioners' alleged antitrust violations had no 'substantial impact on interstate commerce'. . . . [T]he conclusion of the District Court . . . cannot be considered erroneous. [419 U.S. at 202-03]

If the sale of asphalt for direct use in constructing and repairing interstate highways cannot be presumed to substantially affect interstate commerce, then, *a fortiori,* brokerage services in New Orleans, which are only incidentally and tangentially related to realty financing, cannot be so presumed.

B. Brokerage fees do not presumptively affect interstate commerce

Plaintiffs contend for the first time in this Court that any effect on interstate commerce stems not principally from the functions brokers perform, but rather, from the prices they charge. Plaintiffs (at 54), and the government (at 15), ask this Court to presume that the brokerage fees, which are solely paid by home sellers,[6] are passed on to buyers in the form of higher home prices, which in turn lead to higher mortgage loans, which in turn affect the interstate flow of money.

Because this "passing-on" theory was never presented to or commented upon by the lower courts, it should not be considered here.[7] The theory, in any

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[6] Derbes deposition at 67 (page not reproduced in plaintiffs' appendix).

[7] In *Ramsey* v. *United Mine Workers,* 401 U.S. 302 (19[illegible]), an antitrust suit against a union, plaintiff, just like plaintiffs here, presented a new theory in the Supreme Court as to why the Sherman Act was applicable to defendant's conduct. This Court declined to consider it:

> We find no reference to this aspect of the case in the opinions of the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem

event, is totally without support in the record and directly conflicts with this Court's recent decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977).

First, no evidence in the record suggests in any manner that home sellers do in fact pass-on brokerage fees to buyers. Moreover, the residential real estate market is a classic example of an atomistic market with many, many sellers and buyers, and prices determined by supply and demand. There is nothing in the record to suggest that those sellers using brokers have sufficient market power to pass-on their higher costs.[8]

Second, in *Illinois Brick, supra,* this Court held that because of "evidentiary complexities and uncertainties" [431 U.S. at 732], antitrust plaintiffs would not be permitted even to try to show that any alleged unlawful overcharges were passed-on to them through an intermediary. Like Sherman Act interstate commerce

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it inappropriate to consider it in the first instance. [401 U.S. at 312]

Here, not only was plaintiffs' "passing-on" theory not presented below, it is totally without record support.

[8] For example, in *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.,* 50 F.R.D. 13, 26 (E.D. Pa. 1970), *aff'd,* 438 F.2d 1187 (3d Cir. 1971), the court dismissed an antitrust action by homebuyers against plumbing fixture manufacturers, commenting that to assume any plumbing overcharges were passed-on in the form of higher home prices would be "incredible":

> It would be incredible if the price of a house were determined not by the shifts in supply [and] demand in the market for homes as a whole but rather by a relatively miniscule change (with respect to the selling price of the house) in the price of plumbing fixtures. . . . [T]he claims of the plaintiffs under consideration in their capacity as homeowners are blocked by insurmountable difficulties of proof.

questions, which are resolved based on real-world "intensely practical concept[s]" [*Yellow Cab Co., supra,* 332 U.S. at 231], the Court's decision in *Illinois Brick, supra,* was firmly grounded " 'in the real economic world, rather than an economist's hypothetical model'." [431 U.S. at 732] Yet, the hypothetical model repudiated in *Illinois Brick, supra,* is precisely plaintiffs' theory here—that brokerage fees are passed-on to homebuyers through an intermediary, the seller. If the Court were to accept plaintiffs' speculation, and hold that homebuyers are injured by an alleged conspiracy among brokers to raise fees, then it would, in effect, be overruling the precise holding of *Illinois Brick, supra,* that persons in the position of these buyers cannot be injured parties under the antitrust laws.

Moreover, even if the actual holding of *Illinois Brick, supra,* does not absolutely bar plaintiffs' passing-on theory here, the case, at a minimum, establishes that passing-on cannot be presumed, as plaintiffs seek to do. The majority simply outlawed the passing-on theory altogether based on " 'sound laws of economics'." [431 U.S. at 743] The dissenters saw some vitality in the theory, but recognized that it could not be presumed, but instead must be proved:

> [T]his is a factual matter to be determined based on the strength of the plaintiff's evidence . . . Admittedly, there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on. [431 U.S. at 759 (Brennan, J., dissenting)]

In first outlawing the theory as a defense in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392

U.S. 481 (1968), the Court suggested that since proving any passing-on:

> would require a convincing showing of . . . virtually unascertainable figures, the task would normally prove insurmountable. . . . [392 U.S. at 493]

This consistent judicial scorn for the speculative passing-on doctrine is hardly grounds for creating a presumption here, since as this Court has held: "a presumption upon a matter of fact . . . means that common experience shows the fact to be so generally true that courts may notice the truth." *Greer* v. *United States,* 245 U.S. 559, 561 (1918).

Thus, based on *Illinois Brick, supra, Hanover Shoe, supra,* the complete lack of supporting evidence in the record, and the fact that the argument was not presented in the lower courts, plaintiffs' presumptive passing-on theory should be rejected.

IV. A Substantial Effect On Interstate Commerce Cannot Be Presumed Merely Because Plaintiffs Have Alleged A *Per Se* Antitrust Violation

Plaintiffs' final argument, which we note has not been endorsed by the government, is that antitrust violations that are *per se* unlawful, *ipso facto* substantially affect interstate commerce. Plaintiffs have cited no decision of this Court or any lower court that has accepted this theory. Indeed, all the precedent is to the contrary. In *Goldfarb, supra,* for example, the first two issues decided by the Court were:

> Did respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce? [421 U.S. at 780]

Each issue was separately discussed and resolved. Similarly, in *Gulf Oil Corp., supra,* where defendants were charged with tying, a *per se* antitrust violation,[9] the Court refused to presume a substantial effect on interstate commerce. The Sherman Act itself only prohibits contracts in restraint of "trade or commerce among the several states." 15 U.S.C. § 1 (1976). Plaintiffs simply have no justification in law or policy for their position.

Moreover, holding that *per se* antitrust violations *ipso facto* substantially affect interstate commerce would sweep into the federal domain literally thousands of local practices that previously had been of exclusive state concern. As this Court commented in *United States* v. *Bass,* 404 U.S. 336 (1971):

> [U]nless Congress conveys its purpose clearly it will not be deemed to have significantly changed the federal-state balance. [*Id.* at 349]

Here, not only has Congress given no indication that the Sherman Act interstate commerce requirement should be dropped, but it has also, as discussed above at 10-11, indicated that its power over real estate transactions is quite limited. Thus, plaintiffs' contention as applied to the facts of this case would violate fundamental principles of federalism. *See National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

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[9] *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1957).

CONCLUSION

Plaintiffs (at 13) have conceded that the defendant New Orleans real estate brokers are not in commerce. Plaintiffs have failed to prove any facts showing that defendants substantially affect commerce. Plaintiffs' requests that this Court presume such effects are wholly misguided legally and factually. Accordingly, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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